



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 15, 1997

Ms. Martha C. Wright
Wright & Associates, P.C.
P.O. Box 531777
Grand Prairie, Texas 75053-1777

OR97-0085

Dear Ms. Wright:

On behalf of Grand Prairie Independent School District ("the school district"), you ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your requests were assigned ID# 28718.

The school district has received three requests for information relating to an investigation of its superintendent. We have combined our decisions about these requests in this one letter.

The school district received a request for the following information:

1. Written list of allegations by the school board that formed the basis for an outside investigation by James Deatherage;
2. The written findings of Deatherage's investigation given to the school board.

As responsive to this request, you enclosed copies of a letter from Mr. Keith Head, President of the Board of Trustees of the school district, to Dr. Marvin Crawford, Superintendent of the school district. This letter contains "five areas of investigation" of the superintendent's performance that appear to be the allegations against the superintendent. You also enclosed an interim report and a final report of the investigation. You seek to withhold this information from required public disclosure based on sections 552.102, 552.103(a), and 552.107(1) of the Government Code.

The school district also received two requests for the following information:

The written list of directives given by the school board to the school superintendent on the evening of July 25, 1994.

The school district seeks to withhold the list of directives based on sections 552.101, 552.102, and 552.111 of the Government Code.

We begin with the list of allegations and the two investigative reports. You say these documents are in a personnel file and that their disclosure would constitute an unwarranted invasion of personal privacy. Section 552.102 of the Government Code excepts information from required public disclosure "if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102. The test to be used in applying section 552.102 is the same test as the test formulated by the Texas Supreme Court for determining a violation of the common-law privacy tort. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). To be within the common-law tort, the information must (1) contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) be of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Information about a public employee's job performance is not information about that person's private affairs. Moreover, a public employee's job performance is a legitimate public concern. See Open Records Decision No. 444 (1986). Thus, the school district may not withhold the allegations or the investigative reports based on section 552.102 of the Government Code to protect the privacy of the superintendent.

You say the "information in the document was developed in anticipation of litigation and is therefor [sic] not discoverable under the Texas Open Records Act." We presume you are asserting section 552.103(a) of the Government Code. That provision applies to information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determine should be withheld from public inspection.

Gov't Code § 552.103(a). To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance, you have provided no information to demonstrate that litigation is pending or reasonably anticipated. Consequently, the school district may not withhold the requested information under section 552.103(a) of the Government Code.

Finally, you assert that "all of the information is subject to the Attorney Client Privilege." Section 552.107(1) of the Government Code excepts from required public disclosure:

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

Generally, section 552.107(1) applies to communications that contain legal advice or opinion, or client confidences. *See* Open Records Decision No. 574 (1990). The exception does not apply to factual information in investigative reports, even when prepared by an attorney. *See* Open Records Decision Nos. 462 (1987), 429 (1985), 230 (1979). This is so because when an attorney conducts an investigation, that attorney is acting as an investigator, rather than as an attorney or legal advisor. *See* Open Records Decision No. 462 (1987) at 11. Thus, the factual material compiled during the investigations is not subject to protection under section 552.107(1). *See id.*

Section 552.107(1) does not apply to the letter from the president of the school district's board of trustees to the superintendent. This letter is not a communication between an attorney and a client. As for the two reports, except for small portions that contain legal advice and opinion, the bulk of the two reports contain factual information the investigator compiled as a result of interviews with various school district employees. Section 552.107(1) does not apply to this factual information. *See id.*

However, one small portion of one of the reports contains private information regarding an allegation of sexual harassment. This information must not be released pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). We have marked the reports accordingly.

We turn to the written directives which the school board provided the superintendent. You raise section 552.101 of the Government Code, which excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You cite no law which would deem this information confidential. We are aware of no law that makes the information confidential. Therefore, you may not withhold the information under section 552.101 of the Government Code.

Section 552.102, as mentioned above, only applies to information in a personnel file when its disclosure would constitute a violation of the common-law right to privacy. The directives contain no information about the superintendent's private life; they do not meet this test.

Finally, you raise section 552.111 of the Government Code. This exception applies to interagency or intraagency communications of advice, opinion, or recommendation reflecting the deliberative or policymaking process of the governmental body at issue.

See Open Records Decision No. 615 (1993). This exception does not apply to factual information that is severable from the opinion portions of a communication. See *id.* at 4-5.

The board directives consist of a list of mandates for the superintendent. The document contains no advice, opinion, or recommendation reflecting the deliberative or policymaking process of the school district. Therefore, the school district may not withhold the board directives under section 552.111 of the Government Code.

In summary, the school district must release all of the requested information except for the portions of the investigative reports that we have marked as excepted under sections 552.101 and 552.107(1) of the Government Code.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Government Section

VDP/rho

Ref.: ID# 28718

Enclosures: Marked documents

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